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II.—PRECEDENTS.

In my last lecture, I told you that the English rule as to precedents was a special feature of that system which distinguishes it from other systems of jurisprudence. In this and the next lecture, I propose to consider the rule, its history and its implications, but before that is done it may not be out of place to take a brief survey of the doctrine as found in other systems of jurisprudence.

The rule as to precedent is, as well known, a branch of the doctrine *Res judicata pro veritate accipitur* though the rule as to the conclusiveness of adjudication *inter partes* alone is generally given the name of *Res judicata.* The rule as to precedents makes adjudications as to points of law conclusive not only as between parties but also as to third parties. There is clear recognition of the principle of *res judicata* under the Hindu Law so far as parties *inter se* are concerned, the plea being known as the plea of Prak Nyaya Nirnaya (literally, prior adjudication) and it was also the practice to give to the successful party a "jaya patra" or "memorial of victory." Written pleadings were insisted upon in Hindu Courts. It is very unlikely that in the complex administration of the Mauryas, for instance, there would have been no provision for the maintenance of the permanent records of the Court embodying the results of litigations. The existence of permanent records of the Court to which, when doubt arises, reference could be made was one of the factors that contributed to the doctrine of both *res judicata* and precedent in England. Looking to the theoretical sources of Hindu Law, we have it in one of the verses of Yajnavalkya :—

*The second of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

Chatvaro Veda Dharmajnah Parshat Traividya mevava sa brute yam sa Dharmah syat Eko vadhyatma sattamah (1)

" Four men versed in the duties prescribed by the Vedas or versed in three sciences constitute an assembly. What it speaks is Dharma or that which one the best self-knower speaks."

This description applied to the king's *sabha* which advised the king's judges in the administration of justice. The constitution of the Sabha is laid down in the following verses :— " Srutadhyana Sampannah Dharmajnah Satyavadinah Rajna Sabhasadah Karyah (2)." *Yajnavalkya*—" Those should be made assessors by the King who have studied the Vedas and Sastras, who know the law, " " Yasmin Dese Nishidanti viprah Vedavidah strayah .Rajnashchadhikrito vidwan Brahmanah stam Sabham Viduh (3). " " In whatever place three Brahmans sit together with the learned Brahman appointed by the King, that sabha "—*Manu.*

The importance assigned in Hindu Law to usages under the rule " Acharah Paramo Dharmah (4) " " usage is transcendental law " or " Sadhbiracharitam Yat Syat Dharmikaischa Dwijatibhi Taddesa Kula Jatinam Avirudham prakalpayet (5) " or in the other verse " Jati Janapadan Dharman Srenidharmancha " etc. must also have, speaking purely from *a priori* considerations led to the recognition of precedent as a source of authority. The question naturally suggests itself why these very propitious conditions did not lend themselves to the growth of a rule or theory analogous to the English theory of precedent. The reasons were the overshadowing authority of the Smritis, the ascription of authority to the sabha and not to the king or his judge, and finally the absence of a centralised system of courts as you have in England. Under the Hindu regime of gradation of courts like Kula,

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(1). चत्वारो वेदधर्मज्ञाः पर्षत्त्रैविद्यमेव वा ।
सा ब्रूते यं स धर्मः स्यादेकोवाऽध्यात्मवित्तमः ॥ ९ ॥ याज्ञवल्क्यस्मृतिः आचाराध्यायः

(2). श्रुताध्ययनसंपन्ना धर्मज्ञाः सत्यवादिनः ॥
राज्ञा सभासदः कार्या रिपौ मित्रे च ये समाः ॥ २ ॥ याज्ञवल्क्यस्मृतिः व्यवहाराध्यायः

(3). यस्मिन्देशे निषीदन्ति विप्रा वेदविदस्त्रयः ।
राज्ञश्चाधिकृतो विद्वान्ब्राह्मणस्तां सभां विदुः ॥ VIII ११ ॥ मनुस्मृतिः

(4). आचारः परमो धर्मः श्रुत्युक्तः स्मार्त एव च ।
तस्मादस्मिन्सदा युक्तो नित्यं स्यादात्मवान्द्विजः ॥ I १०८ ॥ मनुस्मृतिः

(5). सद्भिराचरितं यत्स्याद्धार्मिकैश्च द्विजातिभिः ।
तद्देशकुलजातीनामविरुद्धं प्रकल्पयेत् ॥ ४६ ॥

Pooga and Shreni and the stringent conditions on which appeals were permitted must have kept the work of king's courts in very modest proportions—not sufficient certainly to give a special preference to the king's judges over the learned men who specialised in the Smritis. The Hindu lawyers developed a system of interpretation of the texts which bears a close analogy to the rules adopted for discriminating between the various precedents in England. What little chance there was for the development of a rule like the English rule during the Hindu period disappeared with the advent of the Muhammadan rule when the Hindu Law became entirely dissociated from the king's courts and had to rely for its development on pandits and the local panchayats.

The doctrines of *Ijma* and *Zanni* (juristic deduction) of the Mahomedan Law also had in them elements which might have contributed under a longer period of stable government than was vouchsafed to the development of a rule like the English rule. *Ijma* is consensus of juristic opinion while juristic deduction is isolated juristic opinion. The two stand more or less on the same footing as a decision and a course of decisions. The latter is binding authority under the Mahomedan Law unless formally set aside by a conclave of jurists. The former had only presumption of correctness in its favour and could be shown to be wrong. This doctrine bears remarkable resemblance to the German theory as to precedents. Even in America, binding authority seems to be assigned only to a course of decisions and not to isolated cases, a theory which we will find had supporters in England also but has now been given up except when the question of overruling a case comes up, when that circumstance becomes material Necessity for precedents would arise only when society became more and more complex and the simple doctrines of the *Koran* and the early doctors came to be insufficient and even then the supreme authority being the *Koran* and the *Ijma* and *Zanni* only subsidiary authority, the growth of the idea of precedent was neither rapid nor effective.

Under the Roman system Cicero seems to have enumerated *res judicata* as a source of law. Similarly, Emperor Severus attributes binding force to them in the interpretation of ambiguous laws but the contrary principle was established by a constitution of Justinian. For the amelioration of law, the Romans had a more effective weapon in the prætor's edicts and the possession of a code very early and

the supreme authority ascribed to it made ascription of a similar authority to courts incongruous. The absence of a permanent College of Judges also seem to have contributed to this result.

The Continental systems have adopted the Roman rule. The Codes of Prussia expressly provide that "the opinions of law professors and the views taken by prior judges shall not be in any way considered in future decisions." The Austrian code goes further by expressly forbidding the application of even customary law of which judicial usage used to be considered a species. In France also, there is a similar rule preventing judicial interpretation from becoming authoritative. In Italy and Belgium, though there is no special rule forbidding resort to prior decisions, the prevailing theory is that which obtained under the Roman Law. That is to say, a judgment though useful as showing the view of the law held by a qualified body of men, is powerless to constrain another court to take the same view in a similar case. The judgments stand on the same footing as the theories of jurists and if the reputation of the jurist is higher than that of the judge, the jurist prevails. Where the two systems have come into competition as they have done in the Province of Quebec, the Cape Colony and other British Possessions and some of the United States originally settled under the Continental system, the rule ascribing exclusive authority to judicial decisions has invariably been accepted. In the Hindu and Mahomedan systems as administered by the British Indian Courts, it need hardly be said, judicial precedent plays as great a part as in English Law.

In Germany, a recent statute, without interfering with the general theory, prohibits any division of the Imperial Court from delivering a judgment dissenting from the decision of any Division Court. The Full Court must formally overrule the decision. The inferior Courts are not bound by the decision of the superior Court but they do not usually depart from them without substantial reason for the course taken. Rules consistently adopted pass into the category of customary law and become binding. The necessity for case-law is not so imperative in Europe as in England as it is mostly governed by Codes which make elaborate provisions for most conceivable situations. If the written law does not provide the rule for the guidance of Courts in a particular situation. the Courts are expected to act on the analogy of the Statutes —the *Yukti* of Sanskrit lawyers—unlike the English Courts

which are expected to decide the case according to common law, much in the same way as in India, the Courts are more disposed to apply the rules of certain statutes like the Transfer of Property Act than the rules of English Law, as rules of equity and good conscience—a course which is encouraged even by the Privy Council.

In England there was no indigenous code or collection of laws to which reference could be made as primary authority; on the other hand, there was very strong prejudice against the introduction of alien rules of law. The only persons who could be said to be custodians of the principles of the indigenous common law or general usages of the realm were the judges. There was no bar or qualified body of men who could be looked to as competitors for the honour. The early writers in law were judges or officers of Court who relied on the judgments decided by them or their predecessors. Broadly speaking, there was no safe guide to the doctrine or the practice of the King's Judges other than the proceedings of the Courts themselves—what the King's Judges had done once they might be expected to do in a like case. Young lawyers began to take notes of cases and the very fact that such notes multiplied, increased the use of precedents and it came to be understood early enough that Judges were in some sense bound to follow their previous judgments. There was no easy access to the records of the Court and even if there was they yielded little as they did not contain the reasons for the judgments (there is some controversy as to the practice in very early times though as to later times there is no doubt). All these factors contributed to the idea that the Judges were the repositories of the law and that their judgments are the best evidence of the law and that the judgments should not be altered, except perhaps on the most substantial grounds. In the earlier Year Books, it will be found that the Judges used to consult on points of law the sergeants present and the Judge's opinion was considerably less important than the sense of the bar much in the way that a duty is cast upon every Dharmashastra-knowing man under the Smritis to instruct the Court if it is found erring. But soon this was changed. As early as 1304, a counsel arguing a case is found reminding the Judge that he must be careful as his decision will govern future cases. From this it does not follow that all cases found in the lawyer's note-books were held to be authoritative. In Edward III's time, there is more frequent citation of

cases than before. In Edward IV and Henry VI's time, citation became so common that there is little difference between the mode of dealing with cases then and now. The doctrine of precedent as at present obtains became more or less established before 1455. Sir Mathew Hale gave four reasons why precedents are best evidence of the law, first because the persons that give their opinions are persons chosen by the king for their learning ; secondly because they are upon their oath to administer the laws ; thirdly because they have the best helps to inform their judgments (that is to say that they have access to the records) ; fourthly because they do *profedere tribunali* and their judgments are strengthened and upheld by the laws of the kingdom till they are reversed or avoided.

From the very nature of the case, the rule as to precedents came to be established in Chancery very late. Resort was had to the Chancellor because the Common Law courts bound by precedents could not afford adequate remedy. To start with, the jurisdiction was the exercise of the King's grace and later on it became the exercise of the King's conscience. Either way jurisdiction was expected to be exercised as occasion required it without regard to precedents. That is why we hear as late as 1671, Vaughan, C. J. exclaiming, " I wonder to hear of citing precedents in matters of equity, for, if there be equity in it, that equity is a universal truth and there can be no precedent in it "; and Lord Nottingham, who is called the Father of Equity, saying in Duke of Norfolk's case " I must be saved by my own faith and must not decree against my conscience and reason. " Lord Chancellors used freely to overrule decisions of their predecessors though modern Chancellors did not exercise the power quite as freely as the old Chancellors did. There are remarkable cases even in modern times in which a Lord Chancellor overruled the decision of his predecessor ; one of the most remarkable being, according to Jessel, M. R., one of the earlier cases heard before Lord Lyndhurst, where he varied a decision of Lord Eldon's. Vice-Chancellors did not consider themselves bound by the decisions of each other and Jessel, M. R. says that he " frequently dissented from judgments of Courts of co-ordinate jurisdiction. " In 15 Ch. D. 377 James, L. J. said " I do not consider the decision of a Lord Chancellor as absolutely binding upon us because every Lord Chancellor's decision was liable to be re-heard not only by himself but also by his successor and there are instances known of it. When

I was sitting with Lord Justice Mellish, we did re-hear decisions of Lord Selborne. There is always this to be considered, that it is the decision no doubt of a superior Court of Appeal but it is always qualified by this that according to the old practice of Chancery, it was liable to be re-heard." The argument is not convincing and Cotton, L. J. did not share the opinion. The practice referred to is used by Jessel, M. R. in quite another and we think more legitimate way. He inferred from that circumstance that a later judgment was more authoritative than the earlier. Though the binding nature of a precedent in equity was acknowledged by Bridgman (1 Modern 307) and Chief Justice Treby, still, till the time of Lord Hardwicke, the law was administered very much according to what appeared to the particular Chancellor to be good conscience applied to the case. Lord Eldon was a great champion in equity of precedents and one of the complaints against him is that he made the administration of equity inelastic and rigid. He said :—"The doctrine of this Court ought to be as well settled and made as uniform almost, as those of the common law, laying down fixed principles but taking care that they are to be applied according to the circumstances of the case. I cannot agree that the doctrines of the Court are to be changed with every and succeeding Judge. Nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of the Court varies with the Chancellor's foot." Notwithstanding this emphatic declaration of Lord Eldon, Lord Cottenham observed in a later case :—"I think it is the duty of this Court to adapt its practice and course of proceeding to the existing state of society and not by too strict an adherence to decline to administer justice and to enforce rights for which there is no remedy." This also goes too far. The principles of equity have become established but their application must be modified according to circumstances. This is what is laid down in (1914) A. C. 14 which we will consider later in discussing the rule as to precedents. At present, the general rule as to precedent is observed as much in equity as at common law. In appraising the value of the old precedents in equity the following observations of Jessel, M. R. in 13 Ch. D. 710 may be usefully borne in mind :—"It must not be forgotten that the rules of Courts of Equity are not like the rules of common law supposed to have been established from time immemorial.

It is perfectly well known that they have been established from time to time, altered, improved and refined from time to time. In many cases, we know the names of Chancellors who invented them. No doubt they were invented for the purpose of securing better administration of justice but still they were invented. Take such things as these—the separate estate of a married woman, the restraint on alienation, the modern rule against perpetuities and the rules of equitable waste. We can name the Chancellors who first invented them and state the date when they were first introduced into equity jurisprudence and therefore in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved and if we want to know what the rules of equity are, we must look of course rather to the more modern than the more ancient cases." These observations were made in the case of *Re Hallett's Estate*(1), the leading case on tracing where Mr. Justice Fry sitting in the Original Court held on the authority of old cases that there was no justification for the application of the principle to the case in hand. He relied upon certain precedents of Lord Hardwicke's time. The Master of the Rolls disregarded those cases as coming at a time when the doctrine had not been established. The principle laid down in *Re Hallett's Estate* has been given a more extended application in *Sinclair* v. *Brougham* (2).

The rule and the reason for it is stated by Blackstone thus :—" It is an established rule to abide by former precedents where the same points come again into litigation as well to keep the scale of justice even and steady and not liable to waver with every new Judge's opinion as also because in that the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule which it is not in the breast of any subsequent Judge to alter or vary." Chancellor Kent states the rule thus :—" A solemn decision upon a point of law, arising in any given case becomes an authority in a like case because it is the highest evidence which he can have of the law applicable to the subject and the Judges are bound to follow that decision so long as it stands unreversed unless it can be shown that the law was misunderstood or misapplied in a particular case. If the decision has been made upon solemn argument and mature deliberation, the presumption

1. 13 Ch D 710. 2. (1914) A C 14.

to regard it as a first declaration or exposition of the law and is in favour of its correctness and the country has got a right to regulate his actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed." In Croke James, 527, the Judges of the King's Bench said that "a point once decided ought to rest in peace." This does not accurately represent the state of the law at any time though the tendency to abide by decisions was much greater at one time than now. The deference paid to precedents in theory was got round by calling into question the accuracy of the report. Lord Mansfield, while affirming that "certainty of the rule was more important in mercantile cases than the reason for it" was the greatest offender in this matter and his successor. Lord Kenyon overruled many of his decisions on the ground that he had overlooked or disregarded earlier precedents. The rule is thus stated by Jessel, M. R. :—"The principle on which an actually decided case in the High Court or the Court of Appeal or House of Lords has been rendered constitutes a rule of law to be followed by Courts of co-ordinate jurisdiction or inferior jurisdiction to the Court which decided the case" and the reason for the rule is that "were it not for the rule our law would be in a most distressing state of uncertainty." As stated by Lord Haldane :—"To follow previous authorities is essential if law is to be preserved from becoming unsettled and vague." The statement of the rule by Jessel, M. R. is more accurate than the other statements and the reason given by him has the merit of stripping it of all the metaphysical elements that abound in the other statements. It makes it clear that it is not merely on mere questions of law that precedent is binding but also in respect of certain questions of fact where a point of principle is involved. The further qualification is that the principle must directly arise in the case and the case must have been decided by the application of the principle in question. If the case involves no principle, it has no value as a precedent. If the case happens to be decided on some other rule—expressions of opinion on the rule, however valuable, does not operate as precedent. The point must have arisen directly not merely by inference or analogy. All these points we shall elaborate later. The definition also refers to the two classes of precedents although it does not state their relative value.

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The binding nature of the precedents does not depend upon their publication. As said by Lord Sumner in (1922) 1 A. C. 413 " Even if the case had not been reported at all, it would still have been a decision which when brought to light by any means must be regarded as an authority. " " I have often wondered, " adds his Lordship, " what would happen if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordship's House, and the transcripts of your Lordship's opinion preserved in the Parliamentary Office, a selection of unnoticed House of Lords' cases. The result might be somewhat unexpected, but the decisions themselves, all Courts, your Lordships included, would be bound to follow them. " In spite of the Law Reporting Act, here in India, it is open to the parties to rely upon earlier decisions if they could be got from the records of the Court or could be brought to the knowledge of the Court otherwise than by a report.

The rule of precedent in its most rigid form applies only to decisions of the House of Lords. They are absolutely binding on itself and all the subordinate Courts. Even a decision arrived at on the principle *semper praesumuntur fro negante,* that is to say, when the House is equally divided has got this authority. A slightly different view appealed itself to Lord Cairns in 2 P. D. 276 at 306 where he says :—" In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding that the decisions as a general rule will be final as to third parties. The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When arrived at, such decisions become elements in the composition of the law and the dealings of mankind are based on a reliance on such decisions. Even as to such decisions, it would perhaps be difficult to say that they were as to third parties under all circumstances and in all cases absolutely final but they certainly ought not to be re-opened without the greatest hesitation. On the other hand, there are not in cases of this description (ecclesiastical discipline) any rights to possession of property which can be supposed to have arisen by the course of previous decisions and in proceedings which may come to assume a penal form, a tribunal even of the last resort ought to be slow to exclude any fresh light which may be brought upon the subject. These observations are of a general nature though made specially with

reference to the Privy Council. As regards that tribunal, it has been followed in (1892) A. C. 644 where their Lordships held that they were entitled in such cases "not only to consider if some fact had not been noticed but also bound to examine the reasons upon which the decisions rest and to give effect in their own view of the law while fully sensible of the weight to be attached to such decision." In (1891) A. C. 284 where a previous decision of the Privy Council was cited their Lordships said :—"Their Lordships think it right to add that although for obvious reasons the case of *Beaton* v. *Muir*, L. R. 6 P. C. 134 was relied on as authority absolutely binding on them by both parties at the bar, yet it would have been their duty had the necessity arisen to consider for themselves, whether the decision is one which they ought to follow. It was given *ex parte*. That being the case, although great weight is due to the decision of the Board they are at liberty to examine the reasons." In (1898) A. C. 380, the House of Lords declined to apply this rule to itself. "It is impossible," said Lord Halsbury, "to disregard the whole current of authority upon this subject to suppose what some people call an extraordinary case or an unusual case, a case somewhat different from the common in the opinion of each litigant in turn, is sufficient to justify the re-hearing and re-arguing before the final Court of Appeal of a question which has been already decided. Of course, I do not deny that individual cases of hardship may arise and there may be a current of opinion in the profession that such and such a judgment is erroneous but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience, the disastrous inconvenience, of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions so that in truth and in fact that would be no real final Court of Appeal. My Lords, interest *rei publicae* that there should be *finis litium* at some time and there could be no *finis litium* if it were possible to suggest in each case that it might be re-argued because it is not an ordinary case. It is said that we might have omitted to notice an Act of Parliament or might have acted on an Act of Parliament which was found to have been repealed. It seems to me the answer is that that would be the case of mistake of fact and when the fact is ascertained the Court might disregard the decision." The rule adopted by the Privy Council seems to be the rule adopted by the Supreme Court of the United States

of America and the various Courts of ultimate resort in that country. An erroneous decision of the House of Lords can be set right only by the legislature. If two decisions of the House are found conflicting, the later in date prevails as in the case of *res judicata*. But as said by Lord Selborne in 7 A. C. 259 "It is your Lordship's duty to maintain, as far as you possibly can, the authority of all former decisions and although later decisions may have interpreted and limited the application of earlier cases, they ought not (without some unavoidable necessity) to be treated as conflicting. The reasons which learned Lords who concurred in a particular decision may have assigned for their opinions have not the same degree of authority with the decisions themselves. A judgment which is right and consistent with sound principle upon the facts and circumstances of the case which the House had to decide need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance." The last looks perilously like making a new ground for the decision. Where there is a difference of opinion or where the Judges vary as to the grounds of decision, it is the opinion or the grounds in which the majority concur that should be taken as authoritative. Observations made by members of the House beyond the *ratio decidendi* which is propounded and acted upon in giving judgment are only to be followed in so far as they may be considered agreeable to sound reason and prior authorities. They are only dicta and have not the binding force of an authoritative decision. Dicta of Judges however eminent in the House of Lords cannot overrule the judgment of Court of Appeal and they continue binding so long as they stand unreversed. Where a question is one which is to be determined on the facts of the case, no case even of the House of Lords, can be authority for another. In this way a judgment of the House of Lords in 13 A. C. 337 was distinguished in (1892) A. C. 208. The decision may be binding authority as to the conclusions of fact arrived at, where the facts are identical but not otherwise. When it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, it is not competent for even the House of Lords to say that the *ratio decidendi* was wrong. It is however always open to a party to contend that the difference between the facts in the case then under discussion and in the

House of Lords are so material as to prevent the case from falling within the *ratio decidendi* of the House even though the opinion of the learned and noble Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion for unless those differences did in fact exist in the case in this House or at least the possibility of their existence was prominently brought forward, the House cannot be taken to have decided that such difference in fact might not make a material distinction in law. On the question as to how far the decision of House of Lords in an English case is binding in Scotch cases, says Lord Selborne in 10 A. C. 499, " the decision of the House of Lords in an English case is conclusive in Scotland as well as in England as to questions of English Law and English jurisdiction which it determined. It cannot of course conclude any question of Scottish Law in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland as a similar judgment of the House in a Scotch appeal ought to have weight in England. If however it can be shown that by any positive law of Scotland or according to the authority having the force of law in that country, a different view of the proper interpretation, extent or application of those principles prevails there, the opinions in these subjects expressed by noble Lords when giving judgment on English appeal ought not to be held conclusive in Scotland."

So far as the Court of Appeal is concerned, the cases where the Court is equally divided have not binding authority as in the House of Lords. The reason is thus stated by Brett, M. R., which is valuable also as an exposition of the rule as to comity :—" It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one Court is bound to abide by the decisions of another Court of equal rank. It does so simply from what may be called the comity of Judges. In the same way, there is no common law or statutory rule to oblige a Court to bow to its own decision. It does so again on the ground of juridical comity. But when a Court is equally divided, this comity does not exist for there is no authority of the Court as such and those who follow must choose one of the two adverse opinions." The same rule would apply where two conflicting decisions of the same

Court are cited. The full Court of Appeal can reverse judgments of a lesser number (20 Q. B. D. 572). This is taken as a more or less universal principle and is applied by the Courts of the United States. Though the rule as stated above is only a rule of comity, the practice in England has been to hold previous decisions absolutely binding leaving it to the Appellate Court to reverse. The previous authorities which are considered as of co-ordinate authority to the Court of Appeal are the Court of Exchequer Chamber and the Lord Justices in Chancery. [(1895) 1 Ch. 51]. The decisions of the Lord Chancellors at all events sitting alone, says Brett, M. R. in 12 Ch. D. 54, " are not to be taken as decisions of Court of Appeal and as absolutely binding on this Court so as to prevent us from even looking into the grounds or considering the case which was before the particular Chancellor. But no doubt the greatest weight ought to be given to such judgments and unless they are shown to be manifestly wrong or manifestly contrary to the general current of authority on the point decided, it appears to me that we ought not to take upon ourselves to overrule them. " Cotton, L. J. says in 29 Ch. D. 953 :—" Although the decision of a Lord Chancellor given before the Judicature Act may be overruled by the Court of Appeal, yet such a course ought to be taken exceptionally and in very strong case. So rarely is that done that practically the decisions of Lord Chancellors and old Lord Justices are considered as binding on the Court of Appeal. " [*See also* 28 Ch. D. 509]. So in 15 Ch. D. 363, Cotton, L. J. felt himself bound by the principle of the decision of a Lord Chancellor but in the passage we have already referred, James, L. J. added a rider based upon the old practice of Chancery. A Vice-Chancellor was always bound by the previous decision of a Lord Chancellor whether he assented to it or not. In 18 Ch. D. 648, Fry, J. thought that the decision of the Lord Chancellor whether he sat in appeal or as an original Judge was absolutely binding on the Master of the Rolls and every other Court of Original Jurisdiction. At that time the Master of Rolls who is now the President of the Court of Appeal, was only an Original Judge from whose judgment appeals lay originally to the Lord Chancellor and later on to the Court of Appeal in Chancery.

So far as the Original Courts are concerned the rule seems to be that they are bound by the decisions of every co-ordinate Court unless they are clearly opposed to authority or

are passed on a misapprehension. If there is a conflict of decisions, the rule already enunciated in the case of the Court of Appeal will apply. Jessel, M. R. took a somewhat laxer view, which is due to his Chancery training. For instance he says in 13 Ch. D. 712 :—"Where a case has decided a principle, although I myself do not concur in it and although it was the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of a respectable age and has been used by lawyers as settling the law leaving to the Appellate Courts to say that the case is wrongly decided." In L. R. 19 Eq. 400, the same learned Judge says :—"If one authority were produced to me and my own opinion were the other way, I would not follow that authority but if the authorities are numerous, I admit I must be bound." But the prevailing opinion is that enunciated by Brett, M. R. in 13 Q. B. D. 355 :—"A Court of law is not justified according to the comity of our Courts in overruling the decision of another Court of co-ordinate jurisdiction." As Vice-Chancellor James remarked in L. R. 8 Eq. 647 "it is not seemly that two branches of a Court of co-ordinate jurisdiction should be found coming to contrary decisions on similar instruments and encouraging as it were a race, by inducing persons who wish for one construction to go to one Court and those who wish for another construction to go to another." Referring to the criticism of Mr. Justice Blackburn of certain cases in L. R. 6 Ex. 132 the same learned Judge sitting as Lord Justice in appeal said :—"That is not the way a Court like this deals with decisions of a Court of co-ordinate jurisdiction. The cases which are cited do not bind us as *res judicata* because they are *inter alios acta* but they bind us so far as they are authoritative expositions and statements of law. It is the principle of the decision by which we are bound, not a mere rule that in exactly similar circumstances we are to arrive at the same conclusion. Therefore to say that the decisions are wrong in principle does not relieve us from the obligation of following the principle of the decision because the whole theory of our system is that the decision of a superior Court is binding on an inferior Court and on a Court of co-ordinate jurisdiction in so far as it is a statement of the law which the Court is bound to accept." There are numerous cases in recent years in English Courts where Courts have acted upon this principle and implicitly followed the decisions of Courts of co-ordinate jurisdiction except when they were opposed to current of

authority or were passed on a misapprehension or when there was a clear conflict of authority.

In the case of Divisional Courts the rule is laid down in (1891) 1 Q. B. 402 thus :—" Though I do not go so far as to say that in every case and under all circumstances the Court is absolutely bound by a decision of another Divisional Court, still according to all the ordinary rules by which the practice of the Courts is regulated, the decision to which I have referred is one by which we should abide."

Nisi prius rulings were at no time considered as absolutely binding as these judgments were a sort of preliminary judgments given by Judges in Assize which were apt to be reviewed by Judges sitting *in banco* for the disposal of the case.

The decisions of the Judicial Committee, except in matters where they are the highest appellate authority, are not absolutely binding, but are entitled to great respect. 2 Q. B. D. 376 ; (1901) 2 K. B. 677. In the last-named case, Kennedy, J. said with reference to the judgment of the Privy Council in 13 App. Cases 22 deciding that damages could not be recovered for physical injuries due to nervous shock unaccompanied by physical impact. " A judgment of the Privy Council ought, of course, to be treated by this Court as entitled to very great weight indeed but it is not binding on us," and he dissented from it. But in respect of one class of cases, great authority is attached to the decisions of the Privy Council. In 9 P. D. 207 observes Lindley, L. J. :—" It is true that decisions of the Privy Council are not theoretically binding on this Court but in the case of Mercantile or Admiralty Law where the same principles are professedly followed in the Colonies and in this country, it is to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or the Courts of Appeal in this country. Even if therefore I doubted the correctness of the decision, I should be disposed to follow it rather than depart from it and so introduce a diversity of practice where there ought to be no difference in principle." In (1921) 2 A. C. 175 Lord Sumner also said :—" What was said by the Judicial Committee as to the effect in law and in business of a distribution of bonus and shares was part of the decree and cannot be distinguished from the present case. Of course, it does not bind your Lordships, but I think it ought to be

followed by all who do not feel themselves prepared to say that it was wrong and to say clearly why it was wrong." The majority, however, thought that the decision in (1914) A. C. 231, on which reliance was placed in that case, turned on the language of the statute in question and also that it was inconsistent with the *ratio decidendi* of an earlier case in the House of Lords. *Fernando* v. *Gunatilaka,* (1921) II A. C 367 contains some useful words of caution in the use to be made of English decisions in the decision of cases under other systems of jurisprudence :—"In all civilised systems of jurisprudence, there are many common principles and many historical processes of development which are very similar and light may often be thrown from one system on another but when this is done the comparison must be handled with care. There is perhaps a special danger with a Court constituted mainly of Judges trained under the English system of a too hasty assumption that some foreign system is in a particular matter identical. Their Lordships, while not neglecting the benefits of English decisions, have considered that their attention must be principally directed to the Roman Dutch Law as governing this case" which arose from Ceylon.

We have so far discussed the relative authority of precedents in England looked at with reference to the Courts that rendered them. It remains to consider what we may call the material contents of the rule itself—on what points precedents bind, their value intrinsically, the considerations that weigh, when the Courts are asked to overrule a case and the advantages and disadvantages of the rule. These matters we shall consider in the next lecture.

SUMMARY OF ENGLISH CASES.

THE KING *v.* BAILEY, (1924) 2 K. B. 300.

Criminal trial—Indecent assault—Separate assaults on different persons—Joint trial and general verdict—Propriety of—Corroboration of evidence against each.

A person was charged for indecent assault, and the indictment contained a number of counts, each constituting a separate assault on a different person. The trial was a joint one. *Held,* in such cases a careful distinction should be drawn between each count and every other count, and the jury should be warned as to the source from which evidence came, and to

weigh the evidence with care with reference to each particular charge, and not to supplement the evidence on any one charge by helpful evidence upon some other charge. A general verdict cannot be supported.

THE KING *v.* CHARLES LESLIE NORMAN, (1924) 2 K. B. 315.

Criminal trial—Habitual criminal—Prior conviction—If admissible as evidence of character—Function of Jury—Prevention of Crimes Act, 1908, *S.* 10 (*Cr. P. Code, S.* 110).

A person who had been found to be a habitual criminal on a prior occasion, was subsequently charged and convicted for certain offences like burglary. At the trial upon proof being given that he had been already sentenced before as a habitual criminal he was told by the Court that evidence on his part was of no avail and the jury was simply directed that under the law it had no other alternative except to find he was a habitual criminal. *Held*, by a majority of the Court of Criminal Appeal (*Lord Hewart, C. J., Horridge, Lush, McCardie, Roche, Green, Swift* and *Branson, JJ.*) the direction to the jury was wrong in law. Unless the offender makes the admission, it is in each case a question, not of law for the Judge, but of fact for the jury whether the offender is or is not a habitual criminal. (1920) 2 K. B. 235 overruled.

When the language of a statute admits of more than one construction, and one construction leads to obvious injustice, it should be rejected and in penal enactments that which is most favourable to the person affected should be followed. S. 10 of Prevention of Crimes Act, 1908, construed.

RICKETTS *v.* COLQUHOUN, (1924) 2 K. B. 347.

Income-tax—Deduction—Travelling expenses—Office of Recorder—Income-tax Act, 1918, *Sch. E, R.* 9.

A man cannot claim a deduction in respect of travelling expenses from his place of residence, which is his own choice, to the place where he exercises his office. Such expenses are not " expenses of travelling in the performance of the duties of the office or employment " within the meaning of R. 9, Sch. E of the Income-tax Act, 1918.

INLAND REVENUE COMMISSIONERS *v.* BLACKWELL, (1924) 2 K. B. 351.

Super-tax—Will—Trustee directed to accumulate surplus income and spend what is proper for minor's benefit—Amounts accumulated if income.

Under the terms of a will, trustees were directed to accumulate the surplus income of an estate and pay the guardian of a minor beneficiary such sums as they thought fit for his maintenance. After attaining majority, the minor was to receive all the amounts in the hands of the trustees. *Held,* during the period of minority, the surplus income accumulated was not *income* of the minor and as such not assessable to super-tax.

ALLEN *v.* SMITH, (1924) 2 Ch. 308.

Vendor and purchaser—Onerous clause is lease—Effect of non-disclosure by vendor—Specific performance—If can be claimed.

During the course of negotiations regarding the purchase of a leasehold property, the vendee asked his vendor to see a copy of the lease, but was told it was quite in the ordinary form. Later on, it was seen to contain an onerous clause and the defendant refused to complete the purchase unless the clause was deleted. In a suit for specific performance by the vendor, *held,* the existence of such a covenant ought to have been brought to the notice of the defendant even at the time of negotiations and he could not be compelled to accept the bargain unless the covenant was deleted.

In re SEARLE, HOARE AND COMPANY, (1924) 2 Ch. 325.

Bankruptcy—Proof of creditor accepted by trustee and dividend paid on that basis—Subsequent reduction of claim by Court—Effect—Adjustment.

The Trustee in Bankruptcy accepted the proof of a creditor as to debts due to him and paid him the first dividend thereon. Subsequently the Bankruptcy Court reduced the amount of his claim after rejecting a portion of the claim which had been accepted by the trustee. *Held,* before getting fresh dividend on the basis of the reduced claim, he must first give credit for the overpayment received on the prior occasion. The

mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently expunged or overpayments made to a creditor whose proof is subsequently reduced does not prevent the operation of the well-known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary. The amount overpaid can be set off against future dividend that may become payable.

LORD ADVOCATE *v.* MACLISTER, (1924) A. C. 586.

Succession duty—Rate of payment—Alteration of rate by Finance Act.

The Finance Act of 1910 increasing the succession duty from 5 per cent. to 10 per cent. provides that that increase shall take effect in the case of a succession arising under a disposition only if the first succession under the disposition arises on or after 30th April, 1909.

A testator who died in 1900 bequeathed the fee of his heritage to a cousin subject to a life rent to the testator's mother who died in 1910.

Held, that the first succession arose in favour of the cousin at the death of the testator and the duty payable was only the smaller amount.

(1921) 1 K. B. 159 considered.

MCDONALD (GERALD) & CO. *v.* NASH & CO., (1924) A. C. 625.

Bills of Exchange Act, 1882, *Ss.* 20, 29 *and* 56—*Bill of Exchange—Indorsement—Delivery to drawer—Subsequent indorsement by drawer—Liability of indorser to drawer.*

The appellants sold to A & Co. certain cases of tinned soup, cash against delivery order. A & Co. not being able to find the necessary money applied to the respondents. The three parties meeting together agreed that the appellants should draw a series of eight bills of exchange on A & Co. to be paid to the appellants' order and hand over the delivery orders in consideration of their being duly endorsed by the respondents. The bills were drawn up and endorsed by the

respondents leaving open above their names for the endorsement of the name of the appellants' nominee. The bills having fallen due the appellants endorsed their own names in the blank space and presented them to A & Co. for payment. The bills were dishonoured. Notice of dishonour was given and payment was claimed from the respondents who denied liability.

Held, (1) on the facts the respondents had made themselves liable to the appellants for payment ; (2) the bills were wanting in a material particular within the meaning of S. 20 of the Bills of Exchange Act and the appellants had implied authority to fill their names which when done made the bill retrospectively enforceable.

5 A. C. 754 distinguished ; (1908) 1 K. B. 263 and (1901) 2 K. B. 593 applied.

WARD & VAN DER LOEFF BURNYEAT *v.* VAN DER LOEFF, (1924) A. C. 653.

Will—Codicil—Construction—Brothers and sisters—Parents living—Legal possibility of after-born brothers and sisters—Gift in codicil void for remoteness—Inconsistent gift in will, if revoked.

A testator by his will devised all his estate to trustees in trust to pay the income thereof to his wife for life and after her life to his children and if there should be no children, the testator gave to his wife a power of appointment among the children of his brothers and sisters.

By a codicil he expressly revoked the power of appointment given to his wife and declared that the life interest of his wife should terminate if she married a person who was not a natural born British subject and the trust funds should be held in trust for all or any of the children or child of his brothers and sisters who should be living at the death of his wife or may be born at any time afterwards before any one of such children for the time being in existence attained a vested interest.

The testator left no issue ; and his father died after him. His widow remarried a Dutch subject. The testator's brothers and sisters were all over 30 years of age at the time of the will. All had children and one of them was born after the remarriage of the widow.

Held, the gift in the codicil was void for remoteness.

1 Cox 324 followed.

On the failure of the gift in the codicil there was no implied revocation of the gift in the will and it therefore took effect.

The persons in whose favour the gift was to take effect should be determined as on the date of distribution, *i. e.*, the remarriage of the testator's wife ; and the child born after remarriage would not take under the will.

Even though the parents were over sixty years the legal possibility of issue was not extinct.

Law Reports 2 H. L. Sc. 397 applied.

43 I. A. 20 referred to.

RUSSEL *v.* RUSSEL, (1924) A. C. 687.

Divorce—Adultery—Birth of child—Evidence of non-access by husband—Admissibility.

The statute which makes husbands and wives competent witnesses in divorce suits does not affect the common law rule that they should not be allowed to give such evidence as will in effect bastardise a child born in lawful wedlock.

BARSTOW *v.* TERRY, (1924) 2 Ch. 316.

Copyright—Dramatic play founded on novel—Agreement granting rights of production—Construction—Cinematograph rights—Copyright Act, 1911.

The plaintiff was the authoress and owner of the copyright in a novel called " The Scarlet Pimpernel. " In 1903 a dramatic version of the same was composed and the plaintiff entered into an agreement with the defendants by which on the fulfilment of certain conditions the entire rights for the United Kingdom, the United States and the Dominion of Canada should become theirs inalienable.

Held, that the entire right in the play became vested in the defendants by the agreement and when the Copyright Act, 1911, came into operation the rights so vested included the right to the cinematograph production of the play.

JOTTINGS AND CUTTINGS.

LATE DR. SIR S. SUBRAMANIA AIYAR.

Reference in the Madras High Court.

THE ADVOCATE-GENERAL—I have this morning to intimate to your Lordship the sad news of the death of the Grand Old Man of Southern India—Dr. Subramania Aiyar. His is not the death that we have frequently to mourn in this Court of a promising career cut off in the prime of life. It is the close of a long and arduous life with duty well discharged in every sphere of work, the worth and value of which has earned the greatful recognition at different times of both the country and the Government.

He was born in 1842 in Madura. He matriculated at the early age of 14. For some time he was employed as a clerk in the Collectorate and dissatisfied with the work he desired to obtain a sanad for practising as a pleader in the District Court of Madura. The District Judge in whose hands lay the gift of a sanad in those days refused it to him and he had to go back to his place in the Collectorate for a time. He privately studied and passed the F. A.Examination in 1866 and the B. L. Examination in 1868. He served his apprenticeship with Mr. J. C. Mills, the Official Reporter to the High Court. He afterwards accepted the post of Tahsildar which he resigned after six months and set up practice at Madura. In a very short time he rose to the front ranks of the profession and was constantly in requisition in the neighbouring districts and appeared in a sensational case even in distant Travancore. He was appointed a Member of the Legislative Council about 1884 and he then came and settled in Madras. From almost the very first he was among the leading practitioners in Madras and in a few years the bulk of the practice and the most lucrative in the Presidency was divided between him and his great rival Sir V. Bashyam Aiyangar. They appeared against each other in all the important cases in the High Court and in the muffasal except when a rich client with a long purse engaged both of them on the same side. He was appointed to the then combined office of Government Pleader and Public Prosecutor in 1888 and when in 1895 Sir T. Muthuswami Aiyar, the first Indian Judge of the High Court died, Sir Subramania Aiyar was appointed a permanent Judge. By a series of retirements soon after his appointment he became the

senior puisne Judge in a few years and he thrice acted as Chief Justice in 1899, 1903 and 1906 and he retired in 1907.

He was the Vice-Chancellor of the University for some years and the University, in recognition of his great services and acknowledged merit, conferred on him the degree of LL. D., an honour which it has conferred on no other Indian. A Knighthood was conferred on him in 1900.

Always religiously inclined, he devoted his life after retirement primarily to religious meditations, religious exercises and religious studies. But one of his ardent and highly emotional temperament cannot but be drawn into the sphere of politics in these troublous times. Connected with political life before he became a Judge, a prominent Congressman from the beginning of the Congress, the Chairman of the Reception Committee in the Congress of 1914, he threw himself into recent political agitation for Home Rule, and whatever differences of view there may be as to his political ideas and ideals there can be none as to his sincerity, lofty and high-minded patriotism and intrepid courage in doing what he considered right in the interests of his country which he conceived to be in the interests of the Empire as well.

This is not perhaps the time nor the place nor is it possible within the short time at our disposal to attempt an estimate of his work and achievements as a lawyer and as a Judge. But one or two things are well worth mention. Of his eminence as a forensic speaker and an effective advocate, it is unnecessary to speak. It is too well known to need mention. His generosity to the junior members of the profession is without parallel and deserves special mention. Men like the late Mr. V. Krishnaswami Aiyar and Mr. P. R. Sundaram Aiyar, who afterwards became so eminent as Lawyers and Judges of this Court, owned not a little to his help and encouragement in their earlier years. It used to be said that with the object of helping a young struggling junior, he would seriously ask him to look up for a point for him and then generously thrust a cheque on him as a remuneration for his services making it easy for him to accept the welcome help without damage to his self-respect.

As a Judge after the first few months, he gave up the habit of reading the papers as inconvenient to himself and to the practitioners and it might well have been so in a Judge

with his quickness and decision. He will patiently listen to the facts of a case narrated, but as soon as the points arising in the case were stated, he would ask the practitioner which point he would take first. He generally left it to the practitioner to choose the order in which he would present his points, but if one would obviously go to the root of the case, he would direct that point to be taken first. Then followed usually a short wrestle at the end of which the practitioner either made good his points or confessed himself beaten. If he succeeded in satisfying a Judge, the process was repeated with the pleader for the respondents. The Judge was equipped for the purpose. He was ready with cases both English and Indian and sometimes American as well. He could nearly always name the cases and give the volume and the Judges who decided them but would sometimes ask one of the juniors gathered in his Court whether connected with the case or not to find out the reference.

In cases in which he had to try questions of fact, his alertness of mind, his great experience as an Advocate and his wide knowledge of human nature stood him in good stead and it was a marvel to see him rapidly turn over the bundle of papers of several hundred pages and alight upon just the passage or the piece of evidence directly bearing on the point.

He was very kind and considerate to junior members of the bar. They went into his Court as they did later into Sir V. Bashyam Aiyangar's with the assurance that even if they missed a point it would be sure to be discovered for the benefit of their clients by the presiding Judge, the only penalty they had to pay being the sometimes expressed but often unexpressed criticisms in the mind of the Judge of his want of perception. It not seldom happened that all the appellant's points were disposed as untenable and then the respondent was called on to support the judgment on a point fatal to his case taken by the Judge himself.

He would often distribute the unrepresented criminal cases, particularly those known as gaol appeals, to the junior members of the Bar in the morning and dispose of them after hearing their arguments in the afternoon. He took these and other modes of testing the junior members of the Bar and select suitable persons for appointment as District Munsifs.

Truly did the *Gazette Etraordinary* issue on the occasion of his retirement say " His judicial qualities, his independence of character and his profound learning which he at all times

displayed in his long and honourable career had earned a name which will long be held in reverence and estimate by the public."

For an estimate of Dr. Subramania Aiyar as a man I cannot but recall the following appreciative reference by Lord Ampthill. His Lordship said :—" I regard him as the soul of honour, as a man who had absolutely no personal ends to serve and who devoted his great abilities to the public good. It seemed to me that in his life and conduct he affected an ideal compromise between adherence to the Indian ways and the requirements of European methods. Neither too conservative nor too progressive, he remains the perfect model of an Indian gentleman and is broad-minded enough to adapt himself gracefully to the political and social requirements of the British connection of India. His life is an example to all, for the virtues of piety, modesty, industry and patriotism are equally essential to all classes and conditions of men. I shall never forget his demeanour when His Majesty the King at that time Prince of Wales, visited Madras, for it was a picture of that respectful dignity and dignified respect which are among the true characteristics and most forceful qualities of Indians. "

With his death passes away a great man, a great patriot and the last of a generation of giants who began their career as humble Government servants and ended as able administrators of Native States or as able Lawyers and Judges of the highest Courts in the land.

I wish to convey to the members of his family the condolence of this vast concourse of the members of the Bar assembled in the scene of his former labours to pay their respectful tribute to his memory.

THE CHIEF JUSTICE :—Mr. Advocate-General and Gentlemen,—I am, of course, aware that the late Dr. Subramania Aiyar was a distinguished member of your profession and of the Bench which is represented on this occasion by myself and my learned brothers.

The outstanding lesson of his career as a lawyer appears to me to be this: that he showed that if a moffusal practitioner gives his heart to his professional work he can successfully rise to the highest honours that the profession could offer. I hope that others will follow his example. But you will

realise that I can only speak from traditions of one who to me can only be a recollection handed down to me by my elders and, therefore, I am going to ask my brother Kumaraswami Sastri to respond to the speech that you, Mr. Advocate-General, have made, for he has the advantage of personal knowledge of the late Judge's work both at the Bar and on the Bench of which he was an ornament.

KUMARASWAMI SASTRI, J. :—Mr. Advocate-General and Members of the Bar,—I wish to associate myself most cordially with the eloquent tribute that has been paid to the memory of the late Sir S. Subramania Aiyar. His was truly a great career, great in the knowledge of law, great in the appreciation of facts, and greater still in that larger humanity and charity which endeared him to all who came in contact with him. That such a career should have come to a close, even though it closed in the ripeness of time, must to all of us be a source of sincere sorrow, and nobody regrets his loss more than I do. He was to me and to my father a personal friend, and I remember the kindness with which he moved for my enrolment at the Bar and the kindness he showed me afterwards during the short time he was at the Bar and afterwards when he was a Judge. For a few years I watched with great admiration as an apprentice and as a junior his career as a vakil of this Court. The first occasion I had, was to see him argue the famous Tanjore Judgment Forgery Case, which he conducted with rare ability and skill and won the applause not only of the Judges of the day but of the entire Bar for the able way in which he vindicated justice. Later on as a Judge he was one of the finest Judges that it was possible to come in contact with. I remember his sitting on the Original Side for a short period and the quickness with which he grasped the rather complicated procedure of that Court and the satisfaction which he gave to everybody by the grasp not only of the law but of the evidence in the case. In fact, it is difficult to find a Judge who like him was almost intuitively able to find out the truth in a mass of complicated evidence. As a Judge, he lives in the series of Indian Law Reports where more than one branch of the law has had the advantage of exposition which was unequalled in clearness. The way in which he elaborated the Law of Landlord and Tenant in this country won the admiration of those to whom that branch of the law was till then rather novel and was guided almost en-

tirely by English principles of Landlord and Tenant. In Hindu Law, while he was progressive, he avoided any views that were not strictly in consonance with the approved texts and authorities. And what is more, he was always guided by a distinct desire to do justice—justice which never failed at his hands either for want of advocacy or otherwise—for he was always prepared with his work and no case suffered because it was not presented to him in all its aspects for he himself had such an intimate knowledge of law and such an extensive acquaintance with human nature that he rarely went wrong in any decision.

It is a sad thing to note that his career has ended almost in retirement, and that for several years the legal profession lost the advantage of his presence in Court. He retired prematurely because he thought that his failing health would not enable him to do full justice. The high sense of honour which always guided him made him resign his Judgeship at a time when he could have continued for some years with profit both to himself and the public ; and in spite of the earnest remonstrances of all his friends, he retired because he thought that he was not able to do that justice which his position and high ideals required.

As regards his kindness to everybody, his sympathy for those in distress, and the ready help which he always gave to those who sought it, they have been household words in Madras. Nobody who had anything to do with him failed to be won by his innate courtesy and kindness, and his desire to please others which was a characteristic of his to the end.

With Sir V. Bhashyam Aiyangar and Sir T. Muthuswami Aiyar—to him and to those Judges we owe a debt of gratitude, which I think we can never repay, for they set before us an ideal to be followed and a memory which I hope will live as long as the memory of man lasts.

THE CHIEF JUSTICE :—Mr. Advocate-General,—I may ask you on behalf of the Bench to associate the Bench in the message of condolence with which you have charged yourself to the relatives of the late Subramania Aiyar.

Question of closing the Court.

With regard to the question of closing the Court, it has become the settled practice of this Court not to close the Court except in the event of the death of a Judge in active service, and

I can assure you and the Bar through you that it is out of no disrespect to the memory of the late Judge that we feel ourselves constrained on this occasion to follow the established custom.

The Elections and the Law :—Though the final election results are not known as we go to press, it is obvious that the Labour Government, whose appeal to the country was primarily determined by its action in the Campbell case have been defeated at the polls. This means, of course, a change in all the great legal offices ; and the new appointments will be awaited by the profession with much interest. Several distinguished lawyers on the Liberal side have gone down in the battle. The defeat of Mr. Asquith, one of the greatest Parliamentarians that ever came from the Bar, will be sincerely regretted, on personal grounds, by all the members of his old profession. It is not uninteresting to remember that, while the Liberal Party has but one ex-Lord Chancellor in Lord Buckmaster and one ex-Attorney-General in Sir John Simon, the Conservative Party has three ex-occupants of the Woolsack in Lord Cave, Lord Birkenhead, and Lord Finlay, and three ex-Law Officers in Sir Douglas Hogg, Sir Thomas Inskip and Sir Leslie Scott. One reason why all lawyers will take a special interest in the legal appointments in the new Government is that one of the earliest duties of the new Parliament will be, not only to pass the Bill postponing the operation of the Law of Property Act—the monumental Act to which Lord Birkenhead's name is usually given—from 1st January, 1925, to 1st January, 1926, but also to pass the seven consolidating and amending Bills introduced last session.

—*The Law Journal*, November 1, 1924, p. 671.

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Divorce Cases at Assizes :—It is, of course, fully recognised that the task of a King's Bench Judge, upon whom is cast the duty of trying undefended divorce cases at Assizes, is a difficult and anxious one, especially having regard to the fact that judicial work at Assizes is sometimes done under conditions of considerable stress. Due regard being given to the difficulty of the position, the possible result to a petitioner, as exemplified by the case of *Higgins* v. *Higgins*, which came before the Court of Appeal on 22nd October, can only be regarded as extremely unsatisfactory. In the case in question, according to the *Times* report of the judgment of the

Master of the Rolls, "the trial Judge, sitting at Manchester Assizes, in the state of business before him, dealt with the case summarily, without going into the authorities. He refused the decree (on the ground of connivance) and left the petitioner to her remedy in the Court of Appeal, where the authorities could be considered !" The petitioner sought relief under the Poor Persons Rules, and, when her appeal came on, her counsel was stopped in his argument and not required to complete it, the appeal being allowed. To say in effect to a litigant : "I have no time now to look into the authorities affecting your case, so I will decide against you, and you can go to the Court of Appeal if you like" is little less than a denial of justice. The system by which undefended divorce cases are triable at Assizes was designed for the benefit of petitioners and to enable expense to be saved. The adjournment for argument in London of points of law arising at Assizes is a very common practice, and there seems to be no reason why it should not have been followed in the case to which we are referring. It may be pointed out that this is one of those cases in which a person suing under the Poor Persons Rules may easily have an advantage over one who is unable to bring himself within the prescribed limits of income, and who is yet a person of very small means. In *Higgins* v. *Higgins* the petitioner's appeal was heard without expense to her, but it may well be that had she not been technically a 'poor person' the costs of an appeal might have been entirely beyond her reach.

—*The Law Journal,* November 1, 1924, p. 672.

Dr. Johnson and the Law :—It is pleasant to find Mr. Justice Mackinnon maintaining the literary associations of the Bench by writing a scholarly and attractive paper on 'Dr. Johnson in the Temple,' which has appeared in the *Cornhill Magazine* in the very month in which he was appointed to the Bench. All good Johnsonians who wish to become familiar with the Doctor's chambers and friends in the Temple—'the home of lost cases and impossible opinions,' as Mr. Justice Mackinnon calls it—will find plenty to inform and amuse them in a delightful article. Here it may be permissible to point out that Dr. Johnson's connection with the law promised to be rather more intimate than that founded on his residence at 1, Inner Temple Lane. Boswell was a member of the Bar, and Hawkins, his other biographer, was an attorney. Lord

Stowell, in whose famous judgments in the Prize Court 'something of the Johnson touch' was found by Mr. Justice Mackinnon as he read passages from them to Sir Samuel Evans, was one of the Doctor's executors. Probably as the result of conversations with his legal friends on professional matters—and no laymen ever spoke more wisely of law and lawyers than did Dr. Johnson—he had some thought of making a serious study of the law, and even proceeded so far as to compose a prayer that his legal studies might be sanctified 'to direct the doubtful and instruct the ignorant and prevent wrong, and terminate litigation.' So admirable a prayer might sometimes be repeated in the chapel of the Inns, though not every young advocate could be expected to join whole-heartedly in its concluding words. They might, perhaps, be pardoned even by the profoundest admirers of 'the great lexicographer'—as Miss Pinkerton delighted to call him—if they ventured to urge that the desire to 'terminate litigation' may not always be consistent with the wish to 'prevent wrong.'

—*The Law Journal,* November 1, p. 673

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The Law and Parliament :—Although the rout of the Liberal Party at the polls has left but Sir John Simon and Mr. Harney to share with Sir Patrick Hastings and Sir Henry Slesser the honour of being the only King's Counsel on the Opposition benches, yet the General Election has not resulted in any material reduction in the number of lawyers in the House of Commons. In the last Parliament there were—so it was estimated—one hundred and six members of the legal profession ; in the present House of Commons there are ninety-five. No Prime Minister has ever had at his command a larger array of legal talent than has Mr. Baldwin. All the distinguished Conservative lawyers who were in the last Parliament, including Sir Douglas Hogg, Sir Thomas Inskip, and Sir Leslie Scott have been returned to the new House of Commons. In addition, there are such outstanding legal figures in the House of Lords as the Earl of Birkenhead and Lord Cave. As we go to press the legal appointments in the new Government have not been announced. Whoever is appointed Lord Chancellor or Attorney-General may safely be relied upon to continue the work of law reform which has been so distinctive a feature of legal administration in recent years.

—*The Law Journal,* November 8, p. 687.

From Bench to Bar :—If Mr. Forbes Lankester carries out his avowed intention of returning to the Bar when, on reaching the age limit of seventy, he ceases to be a London magistrate, he will be by no means the first occupant of the Bench to resume his status as an advocate. Only a few years ago, the Hon'ble John de Grey returned to the Bar after serving in the same sphere of judicial work. There have been County Court Judges who, voluntarily abandoning their judicial duties, have again enjoyed the forensic life. The late Sir D. Brynmor Jones resigned his County Court Judgeship to enter the House of Commons, and ended his career as a Master in Lunacy. Colonial and Indian Judges in plenty have re-appeared in the Courts on returning to England. Sir Walter Schwabe, K. C., who recently resigned the office of Chief Justice of Madras, followed a fairly familiar practice in resuming his place at the Bar. Precedent is not wanting even so far as High Court Judges are concerned. Macaulay states, for instance, that Pemberton, who was one of the counsel at the trial of the Seven Bishops, had in the time of Charles II been Chief Justice of the King's Bench, and had, on being removed from his high place on account of his humanity and moderation, returned to the Courts as an advocate. To support the view that a Judge remains a barrister there is the characteristic address which Lord Esher delivered in bidding the Bar farewell on his resignation of the Mastership of the Rolls :—

" I am still one of you. I am a serjeant-at-law. I am a barrister of more than ten years' standing. I am capable of being appointed a County Court Judge or to sit as a Commissioner to hold an Assize. It is true that on the Bench, where I was in the position of an officer on the quarter-deck, I was obliged to give occasionally words of command ; but the moment one leaves the deck one is nothing but a fellow officer, and I have nothing but a fellow barrister with you always. "

A similar view was expressed by Lord Halsbury, who, after he had broken all records of long service as Lord Chancellor, responded to the toast of 'The Bar' at a legal function, and remarked that 'he had been a member of the Bar for sixty-three years and claimed to be one still.' Sir Henry Hawkins was credited in his later years with the intention of resuming his old place as an advocate, 'in order to show these young fellows how it ought to be done.' There is, however,

no modern instance of a High Court Judge returning to the Bar, and there is ample reason for hoping that none will be provided. The prestige of the judicial office would certainly not be enhanced if Judges were on the Bench to-day and at the Bar to-morrow.

—*The Law Journal,* November 8, p. 689.

CONTEMPORARY LEGAL LITERATURE.

New Law Point in Appeal :—The following note in the *Law Quarterly Review* for October, 1924, will be read with interest by practitioners in Appellate Courts :—

In *Benaim and Co.* v. *Debono* (1), the appellants were permitted to raise, and that successfully, a point appearing upon the evidence for the first time in the Privy Council. There is direct authority to be found for adopting this course in the decision of the same tribunal *Bank of New South Wales* v. *O'Connor* (2). The language of Lord Macnaghten in that case may be recalled. " In their Lordships' opinion there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the Court below was not called to it. The appellants are to blame as well as the respondent for the way in which the litigation was conducted. But their Lordships are not at liberty to countenance a departure from settled principles, because in the conduct of the action, both parties have chosen to ignore them. " Neither the decision in *Bank of New South Wales* v. *O'Connor* (2) nor the passage set out at length was referred to in the recent decision. It cannot be said that the circumstances under which an appellate tribunal has allowed issues to be raised for the first time upon the hearing of an appeal have been reduced to any clear or satisfactory rules of general application indeed, the question was regarded recently in the House of Lords as one of discretion *North Staffordshire Railway* v. *Edge* (3). There is much weight in the suggestion of Lord Buckmaster in that case, that the discretion to entertain the appeal should be exercised " so as to avoid injustice being done. " In *Jenkins* v. *Price* (4), " neither in the pleadings nor in the

1. (1924) A C 514 (P C).
2. (1889) 14 App Cas 273.
3. (1920) A C 254.
4. (1908) 1 Ch 10.

argument in the Court below, nor in the judgment of Swinfen Eady, J., was there any allusion" to the covenant which the Court of Appeal held concluded the case in favour of the appellant. *Johnson* v. *Pickering ; Norton Claimant* (1) was a stronger case still, for the appellant succeeded "not on any ground which his counsel put forward in support of the appeal, but on a ground which was suggested for the first time by the Court [of Appeal], and with regard to which we have not been able to obtain much assistance from counsel," and in this resembled *Bank of New South Wales* v. *O'Connor* (2).

[For an Indian Appeal in which a new point was raised before the Privy Council but was negatived by their Lordships. see *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3)].

Waiver of Jurisdiction :—In the same journal appears a note on another equally important question of procedure :— "We cannot accede to the suggestion made by Mr. Clements, that because this is a test case we should overlook a manifest want of jurisdiction in the Court of trial. It is always the duty of this Court, even although objection is not put forward by counsel, or in the notice of appeal, to take note of a point which goes to the jurisdiction of the Court of trial" : *per Avory, J.* [*Rex* v. *Dennis* (4)]. That was a criminal case. In the Exchequer Chamber, where the Court itself took objection of want of jurisdiction, although it was stated by counsel :—"The defendant is as anxious for a decision as the plaintiff, and will waive every objection," the Court declined to entertain an appeal *Wellesly* v. *Withers* (5). The members constituting the Court were Jervis, C. J., Cresswell. Williams and Crowder, JJ., Pollock, C. B., Parke and Martin, BB., a somewhat formidable array of legal talent. If any further authority were required for the proposition that total want of jurisdiction cannot be waived by agreement or acquiescence, it would be supplied by *Caledonian Railway* v. *Ogilvy* (6) ; *British Wagon Co.* v. *Gray* (7) and *Alderson* v. *Palliser* (8).

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1. (1908) 1 K B 1.
2. (1889) 14 A C 273.
3. (1896) I L R 23 C 670 : 6 M L J 75 (P C).
4. (1924) 1 K B 867.
5. (1855) 4 Ell and B 750.
6. (1856) 2 Macq H L 229.
7. (1896) 1 Q B 35.
8. (1901) 2 K B 833.

BOOK REVIEWS.

SUPPLEMENT TO THE ALL-INDIA CRIMINAL COURT MANUAL (1920—1924), by P. Hari Rao, B. A., B. L., High Court Vakil, Madras.

We are glad to acknowledge the receipt of Volumes I and II of the "Supplement (1920-1924) to the All-India Criminal Court Manual" containing all the important criminal Acts in daily use with legislative changes and case-law. Volume II gives the Criminal Procedure Code as amended up-to-date and Volume I gives the minor Acts between 1920-1924.

THE LEGAL MAXIM DIARY, 1925.

We are glad to acknowledge the receipt of the "Legal Maxim Diary" brought out by the University Book Agency, Lahore, and hope it will be found useful by the legal practitioners and their clerks.

END OF VOLUME XLVII.